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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ISMAEL ORTEGA, Defendant.	Criminal Case No. 08CR0645-L DATE: AUGUST 25, 2008 TIME: 2:00 p.m. GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS: (1) TO COMPEL DISCOVERY; (2) FOR LEAVE TO FILE FURTHER MOTIONS. TOGETHER WITH STATEMENT OF FACTS, MEMORANDUM OF POINTS AND AUTHORITIES AND GOVERNMENT'S MOTIONS FOR RECIPROCAL DISCOVERY

The United States of America, by its counsel, Karen P. Hewitt, United States Attorney, and Paul S. Cook, Assistant United States Attorney, hereby responds to and opposes Defendants' Motions: To Compel Discovery and For Leave To File Further Motions. This response and opposition is based upon the files and records of the case, together with the attached statement of facts and memorandum of points and authorities. The Government also hereby files its motion for reciprocal discovery.

I

STATEMENT OF FACTS

On Monday, December 10, 2007, at 10:23 p.m., Defendant, drove an Izuzu Rodeo into the United States from Mexico at the Calexico West, California, Port of Entry. Defendant claimed that he owned the car which he had purchased a week before. He claimed he had been visiting his father in Mexicali, Mexico. The CBP Officer inspected the car and tapped the spare tire which felt solid. The Defendant was escorted to Secondary.

In Secondary, a narcotic detector dog alerted to the rear area of the car. The Defendant was escorted to the Security office and returned to search the car. Officers discovered a total of 45 packages of marijuana hidden in the spare tire, tailgate, rear doors, rear seat, and rear quarter panel of the Izuzu. The marijuana weighed approximately 48 kilograms.

ICE agents conducted a video-taped interview of the Defendant. The Defendant was advised of his Miranda rights. He signed an Acknowledgment and Waiver of these rights, and agreed to speak to the Agents without an attorney present. Defendant claimed he bought the car a week prior from a Priscilla Reyes. He stated he went to visit his father on Sunday, December 9th and stayed overnight at his father’s house in Mexicali. He admitted he knew there was marijuana concealed in the car when he drove it into the United States.

II

THE GOVERNMENT HAS AND WILL CONTINUE TO COMPLY WITH ITS DISCOVERY OBLIGATIONS

The United States is aware of its discovery obligations, and will continue to comply with its obligations under Brady v. Maryland, 373 U.S. 83 (1963), the Jencks Act (18 U.S.C. §3500) and Rule 16 of the Federal Rules of Criminal Procedure. and will continue to comply with all discovery rules. The United States has provided Defendant with 48 pages of discovery which includes: agents' reports; copies of seized items; a CD of Defendant's statement; and Defendant's criminal history. The Government will allow Defendant to inspect all tangible objects seized and will provide defendant with a copy of the DEA lab report when it receives it. The United States will provide Defendant with notice of its intent to present evidence pursuant to Rule 404(b) three weeks before trial or as otherwise ordered by the Court. The Government is unaware of any such evidence at this time. Regarding certain specific requests made by the Defendant, the United States responds as follows:

1. Evidence Seized and Preservation

The Government will preserve all evidence seized from the Defendant, who in turn may make an appointment, at a mutually convenient time, to inspect and photograph the evidence (copies of items seized from the Defendant has been provided in discovery).

2. Expert Witnesses

The Government will notify Defendant of its expert witnesses, such as the DEA chemist and drug value expert, and will comply with Fed. R. Crim. P. 16(a)(1)(G).

3. Informant Information

The Government, at this time, is unaware of an informants in this case.

4. Henthorn Material and Personnel Records

The Government will review the requested personnel files of all federal law enforcement individuals who will be called as witnesses in this case for Brady material. The Government will request that counsel for the appropriate federal agency conduct such review. See United States v. Jennings, 960 F.2d 1488, 1492 (9th Cir. 1992).

Pursuant to United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991) and United States v. Cadet, 727 F.2d 1452 (9th Cir. 1984), the United States agrees to "disclose information favorable to the defense that meets the appropriate standard of materiality ..." Cadet, 727 F.2d at 1467, 1468. Further, if counsel for the United States is uncertain about the materiality of the information within its possession in such personnel files, the information will be submitted to the Court for in camera inspection and review.

Defendant has not cited any Federal authority that requires the United States to produce complaints or internal affairs documents. The Pitchess case is inapplicable in federal court, and the United States will be controlled by the obligations imposed by Henthorn. Moreover, Pitchess v. Superior Court, 11 Cal.3d 531, 539 (1974) has been superceded by statute. See Fagan v. Superior Court, 111 Cal. App.4th 607 (2003). Pitchess involved a criminal case in which a defendant who claimed to have acted in self-defense sought evidence as to the police officers' use of force on previous occasions.

Pitchess, 11 Cal. 3d at 534, 535. Pitchess is simply inapplicable to Defendant's case.

5. Criminal Investigation of Any Government Witnesses

At this time, the Government is unaware of any criminal involvement by any prospective government witness, or that any witness is under investigation. Defendant's reliance on United States v. Chitty, 760 F.2d 425 (2nd Cir. 1985), in support of these requests is misplaced. In Chitty, the Second Circuit held that such information was discoverable where the Government witness had been told he was under investigation and thus had a motive to testify favorably for the Government. Id. at 428.

Although the Government will provide conviction records, if any, which could be used to impeach a witness, the Government is under no obligation to turn over the criminal records of all witnesses. United States v. Taylor, 542 F.2d 1023, 1026 (8th Cir. 1976). Disclosure need only extend to witnesses the Government intends to call in its case-in-chief. United States v. Gering, 716 F.2d 615, 621 (9th Cir. 1983); United States v. Angelini, 607 F.2d 1305, 1309 (9th Cir. 1979).

The Government will turn over evidence within its possession which could be used to properly impeach a witness who has been called to testify. A defendant is not entitled, however, to any and all evidence that a prospective witness is under investigation by federal, state or local authorities for misconduct.

6. Bias, Motive to Lie and Prejudice Of Prospective Witnesses

The Government is unaware that any information demonstrating that a witness is biased or prejudiced against Defendant or has a motive to lie. As noted above, the Government will comply with its obligations under Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972).

7. List and Addresses of Witnesses

The Government has provided Defendant with the investigative reports relating to this crime. These reports include the names of the law enforcement personnel, eye witnesses and other people interviewed as part of the follow-up investigation. The Government will provide Defendant with a list of all witnesses which it intends to call in its case-in-chief at the time the Government's trial memorandum is filed, although delivery of such list is not required. See United States v. Dischner, 960 F.2d 870 (9th Cir. 1992); United States v. Culter, 806 F.2d 933, 936 (9th Cir. 1986); United States v. Mills, 810 F.2d 907, 910 (9th Cir. 1987). Defendant, however, is not entitled to the production of addresses or phone numbers of possible Government witnesses. See United States v. Hicks, 103 F.3d 837, 841 (9th Cir. 1996)("A district court that orders the Government and the defendant to exchange witness lists and summaries of anticipated witness testimony in advance of trial has exceeded its authority under Rule 16 of the Federal Rules of Criminal Procedure and has committed error."); United States v. Thompson, 493 F.2d 305, 309 (9th Cir.1977).

Federal Rule of Criminal Procedure 16 does not require the government (or the defense) to disclose the names and addresses of witnesses pretrial. Indeed, the Advisory Committee Notes reflect that the Committee rejected a proposal that would have required the parties to exchange the names and addresses of their witnesses three days before trial:

> The House version of the bill provides that each party, the government and the defendant, may discover the names and addresses of the other party's witnesses 3 days before trial. The Senate version of the bill eliminates these provisions, thereby making the names and addresses of a party's witnesses nondiscoverable. The Senate version also makes a conforming change in Rule 16(d)(1). The Conference adopts the Senate version.
>
> A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contact directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.

United States v. Napue, 834 F.2d 1311, 1317-19 (7th Cir. 1987) (quoting Rule 16 advisory committee notes) (emphasis added).

8. Tangible Objects

The Government will provide copies of or an opportunity to inspect all documents and tangible things material to the defense, intended for use in the Government's case in chief, or seized from Defendant.

9. Training of Relevant law Enforcement Officers and Performance Goals and Policy Awards

Defendant cites no authority for such a broad request, and the Government declines to provide such information as it is not required by Rule 16 of the Federal Rules of Criminal Procedure.

10. Narcotic Detector Dog Information

Similarly, Defendant cites no authority for this request, and the Government declines to provide such information as it is not required by Rule 16 of the Federal Rules of Criminal Procedure. The dog alert in this case was merely part of the secondary inspection for which no probable cause need be established.

11. Reports of Examinations and Tests

The Government will provide Defendant with the results of the drug tests and any other scientific tests done in this case.

III

LEAVE TO FILE FURTHER MOTIONS

The Government has no objection to this motion.

IV

THE GOVERNMENT'S MOTION FOR RECIPROCAL DISCOVERY SHOULD BE GRANTED

The discovery provided to Defendant, at his request, includes documents and objects which are discoverable under Rule 16(a)(1)(E). Consequently, the Government is entitled to discover from the defendant any books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items that are in Defendant's possession, custody or control and which Defendant intends to use in the Defendant's case-in-chief. See Rule 16(b)(1)(A), Fed. R. Crim. P..

Fed. R. Crim. P. 26.2 requires the production of prior statements of all witnesses, except Defendant's. The new rule thus provides for the reciprocal production of Jencks statements. The time frame established by the rule requires the statement to be provided after the witness has testified, as in the Jencks Act. Therefore, the United States hereby requests that Defendant be ordered to supply all prior statements of defense witnesses by a reasonable date before trial to be set by the Court. This order should include any form these statements are memorialized in, including but not limited to, tape recordings, handwritten or typed notes or reports.

V

CONCLUSION

For the above stated reasons, the Government respectfully requests that the Defendant's motions be denied, except where unopposed, and the Government's motion for reciprocal discovery be granted.

Date: August 18, 2008.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/Paul S. Cook
PAUL S. COOK
Assistant United States Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ISMAEL ORTEGA, Defendant.	Case No. 08CR0645-L CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, Paul S. Cook, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of Government's Response and Opposition to Defendant's Motions on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Shaffy Moeel

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 18, 2008.

s/Paul S. Cook
PAUL S. COOK